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10/812,380	03/29/2004	Iftikhar Khan	1800-000001	2606

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Nazir A Khan MD
150 Glenmora Drive
Burr Ridge, IL 60527

11/18/2010

EXAMINER

DEAK, LESLIE R

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PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte IFTIKHAR KHAN and NAZIR KHAN

Appeal 2010-003194
Application 10/812,380
Technology Center 3700

Before WILLIAM F. PATE III, STEVEN D.A. McCARTHY and
MICHAEL W. O'NEILL, *Administrative Patent Judges*.

McCARTHY, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING¹

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

1 The Appellants have filed a request for rehearing under 37 C.F.R.
2 41.52(a)(1)” [“Request”]. The Request seeks reconsideration of our
3 Decision of August 24, 2010 [“Decision”] affirming the rejection of claim
4 17 under 35 U.S.C. § 103(a) as being unpatentable over Squitieri (US
5 6,102,884, issued Aug. 15, 2000), Parks (US 5,399,173, issued Mar. 21,
6 1995) and Twardowski (US 5,509,897, issued Apr. 23, 1996). We have
7 jurisdiction under 35 U.S.C. § 6(b).

8 The Appellants present ten points for our reconsideration. The first
9 nine points presented by the Appellants do not identify any point
10 misapprehended or overlooked by the Board in deciding the appeal. The
11 purpose of a rehearing is to provide the Appellants an opportunity to identify
12 “points believed to have been misapprehended or overlooked by the Board,”
13 37 C.F.R. § 41.52(a)(1), not to provide the Appellants a second appeal.
14 Although the Appellants contend in point 3 that the Board overlooked the
15 state of the law (*see* Request 1), we responded to the Appellants’ contention
16 indirectly in the Principles of Law section on page 9 of the Decision and in
17 the Analysis section on pages 10-11 of the Decision. We deny the Request
18 as to the Appellants’ points 1-9.

19 We grant the request as to point 10 to the extent that we recognize that
20 the Appellants filed an executed “Declaration in Support of Application”
21 (“Declaration”) on April 16, 2009.² We vacate FF 17 on page 8 of the

² Although the Declaration was filed after the Notice of Appeal, the Examiner promised the Appellants during an interview that the Examiner would “consider the declaration and issue separate correspondence relating to the declaration.” (Interview Summary mailed April 23, 2009, Continuation Sheet). Therefore, the executed Declaration was entered for purposes of this appeal.

1 Decision. We modify FF 14 on page 8 of the Decision as follows:

2 14. The Appellants present an executed declaration to which the
3 results of two studies are attached. Each involved “HeRO” vascular access
4 devices, which the Appellants’ executed declaration identifies as
5 hemodialysis arteriovenous shunts “identical to the applicants claimed
6 invention.”

7 In the Declaration, the Appellants declare that:

8 the HERO™ (Hemodialysis Reliable Outflow)
9 vascular access device, manufactured by
10 Hemisphere Inc. company is a hemodialysis
11 arteriovenous shunt identical to the applicants
12 claimed invention. Clinical studies revealed new
13 and unexpected results.

14 These results are a marked decrease in bacteremia
15 rate versus currently used cuff tunneled dialysis
16 catheters and current arteriovenous graft literature.
17 Improved adequacy of dialysis and patency versus
18 currently used cuffed tunneled dialysis catheters.

19 (*Id.*)

20 Nevertheless, we agree with the Examiner that the Examiner’s
21 evidence of obviousness, including the disclosures of Squitieri, Parks and
22 Twardowski, outweighs the Appellants’ evidence of non-obviousness,
23 including the Appellants’ executed Declaration and the two exhibits to the
24 Declaration. Although the Declaration and its Exhibit 1 provide some
25 evidence supportive of a finding that the subject matter of claim 17 provides
26 unexpectedly reduced bacteremia as compared to rates reported in current
27 arteriovenous graft literature, the Declaration fails to provide comparative
28 data showing substantially improved results viv-a-vis the disclosure of the
29 closest prior art, Squitieri.. The Declaration and its Exhibit 1 provide no

persuasive evidence of improved patency as compared to patency reported in current arteriovenous graft literature, since Exhibit 1 reports that the two patencies were found to be equivalent. The Declaration and its Exhibit 2 provide no persuasive evidence of improved dialysis, since Exhibit 2 provides raw results with no comparison to results for arteriovenous grafts. We give little weight to comparisons against cuffed tunneled dialysis catheters because the closest prior art, Squitieri, does not disclose a cuffed tunneled dialysis catheter.

On the other hand, the Examiner has provided strong evidence of obviousness, including an apparent reason for modifying Squitieri's device in the fashion claimed in claim 17 independent of bacteremial properties such as those described in Exhibit 1. While we give some weight to the evidence offered by the Appellants in an effort to prove unexpected results, we conclude that the Examiner's evidence of obviousness outweighs the Appellants' evidence of nonobviousness.

DECISION

We deny the Request as to points 1 through 9. We grant the Request to the extent that we have considered the arguments relating to point 10 and weighed the evidence of obviousness and non-obviousness anew, but otherwise deny the Request.

DENIED

K1h

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